IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

THRIVENT FINANCIAL FOR LUTHERANS,

Plaintiff,

v.

THOMAS E. PEREZ, sued in his official capacity, Secretary, United States Department of Labor, and UNITED STATES DEPARTMENT OF LABOR,

Defendants.

Case No.

COMPLAINT

Plaintiff THRIVENT FINANCIAL FOR LUTHERANS ("Thrivent"), by and through its attorneys of record, brings this action on its own behalf and on behalf of its members ("Members") seeking declaratory and injunctive relief against Defendants THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor, and the UNITED STATES DEPARTMENT OF LABOR (collectively, "Defendants" or "DOL") for violating Federal law.

INTRODUCTION

1. Thrivent brings this action under Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. This civil action seeks judicial review of Defendants' issuance of regulations promulgating a new definition of investment advice fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA"). Specifically, Thrivent challenges DOL's new "best interest contract" prohibited transaction exemption (the "BIC Exemption"). *See* Best Interest Contract Exemption, 81 Fed. Reg. 21,002-01 (Apr. 8, 2016). The BIC Exemption would, by its terms and in its effect, require Thrivent either to cease conducting certain business that is beneficial to its

Members or to abandon its longstanding commitment to resolving Member disputes amicably and through private, one-on-one mediation and arbitration.

2. DOL proposed and adopted the BIC Exemption in conjunction with its recently issued final regulation addressing the definition of the term "fiduciary" under ERISA (the "New Rule"). *See* Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016). This lawsuit challenges only DOL's adoption of the BIC Exemption to the extent that it requires Thrivent to abandon its longstanding commitment to alternative dispute resolution. This lawsuit is not challenging the validity of the New Rule.

3. For decades, Thrivent has marketed and sold a broad range of products to its Members in connection with their Individual Retirement Accounts ("IRAs"), and with distributions from 401(k) or other ERISA retirement plans. Prior to DOL's New Rule, such marketing and transactions have never been regulated by DOL. Instead, IRA and rollover transactions related to securities products (such as mutual funds and variable annuities) have been regulated by the U.S. Securities and Exchange Commission ("SEC") and Financial Industry Regulatory Authority ("FINRA"), and transactions related to insurance products (such as fixed annuities) have been regulated by state insurance regulators.

4. The New Rule would dramatically reshape the way life insurers and financial service providers like Thrivent can market and sell their financial products, including mutual funds and both variable and fixed annuities. Thrivent's sales representatives market and sell numerous proprietary Thrivent insurance and investment products on a commission basis. They regularly offer proprietary investment products for IRAs and rollovers from ERISA plans. Under DOL's New Rule, these sales representatives would be redefined as fiduciaries under ERISA and the Code. Thrivent's longstanding practice of paying these representatives on a commission basis would—for the first time—be treated as a "prohibited transaction" under ERISA. None of these

transactions have ever previously been regulated by DOL, under ERISA or otherwise, and they certainly have not been viewed as "prohibited transactions."[1] If Thrivent were to continue to engage in such transactions, it would be subject to steep and serious penalties under federal law. As a result, without an exemption, the New Rule would almost completely eliminate Thrivent's ability to offer financial products to its Members in connection with their retirement planning through IRAs.

5. In conjunction with the New Rule, DOL also adopted the BIC Exemption. The BIC Exemption would allow Thrivent to engage in transactions that would otherwise be prohibited. To avail itself of the BIC Exemption, however, Thrivent would be forced to agree contractually with its customers that they could pursue a breach of contract action against Thrivent and that they could participate in judicial class actions against Thrivent.

6. Thrivent has long been committed to resolving disputes with its Members through private one-on-one mediation and arbitration. This requirement is in keeping with Thrivent's status as a membership-owned and member-governed fraternal benefit society authorized under Chapter 614 of the Wisconsin Statutes and exempt from taxation under Section 501(c)(8) of the Code. As a fraternal benefit society, Thrivent's relationship with its Members differs significantly from the relationships that commercial stock and mutual life insurance companies have with their customers. Specifically, as a fraternal benefit society, the Code and state law require that Thrivent Members share a

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[1] At the same time that it enacted ERISA, Congress included in Internal Revenue Code of 1986, as amended (the "Code") a parallel "fiduciary" definition applicable to non-ERISA tax-favored plans such as IRAs. *See* 26 U.S.C. § 4975(e)(3)(B). Congress did not, however, impose the same standards of conduct on fiduciaries under the Code that apply to ERISA fiduciaries, nor did it establish the private rights of action that are available against fiduciaries under ERISA. Instead, the limitations in the Code are enforced solely through excise taxes administered by the Department of the Treasury. *See* 26 U.S.C. § 4975(a), (f)(8)(E).

common bond. The common bond among Thrivent's Members is their shared Christianity.

7. Thrivent's mission is to provide insurance and other fraternal benefits to Members as permitted under the law, and to strengthen and assist Christian communities through fraternal and benevolent activities and financial assistance. In support of its mission, Thrivent offers its Members a broad range of proprietary products, including whole life insurance, universal life insurance, term life insurance, fixed and indexed annuities, variable annuities, and (through an affiliate) mutual funds.

8. Given the unique relationship between Thrivent and its Members, Thrivent has long chosen to resolve the rare disputes that arise with its Members in a way that preserves and strengthens its Member relations. For more than fifteen years Thrivent's Articles of Incorporation and Bylaws ("Bylaws") have therefore required that disputes with Members related to insurance products be resolved through a one-on-one alternative dispute resolution process that includes mediation and culminates in arbitration, if necessary. Thrivent's member-elected Board of Directors adopted the Bylaw implementing this alternative dispute resolution process, in the best interests of Thrivent's Membership.

9. As a fraternal benefit society, state law requires that Thrivent's Bylaws, including the arbitration requirement, are uniformly incorporated into insurance contracts with all of its Members. Thrivent's insurance contracts incorporating its alternative dispute resolution program have been approved for sale in all fifty states and the District of Columbia, and its dispute resolution program has been upheld and enforced by state and federal courts throughout the country.

10. Today, Thrivent's alternative dispute resolution program is a core component of Thrivent's governance and member-relations model. It contributes directly to Thrivent's ability to maintain and preserve its fraternal character. Thrivent's ability to structure its governance and internal affairs in the manner that it deems consistent with

the best interest of the society has long been recognized as compelling. For example, more than 90 years ago, Justice Holmes recognized that for fraternal benefit societies, "The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation" and referred to the "indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced." *Modern Woodmen of Am. v. Mixer*, 267 U.S. 544, 551 (1925). The BIC Exemption would impermissibly upend this longstanding practice.

11. The New Rule dramatically expands the definition of a "fiduciary" under ERISA and the Code. Under the new definition of fiduciary, a person who makes "recommendations" to a retirement saver, and who receives a fee or other compensation in connection with that recommendation, becomes a fiduciary under ERISA and/or the Code. Further, Thrivent receives direct compensation for the sale of insurance products that can vary depending on the product sold. As a consequence, Thrivent's financial representatives' sales of numerous proprietary Thrivent insurance and investment products and/or sales on a commission basis would, for the first time, constitute "prohibited transactions" under ERISA. For example, the sale of proprietary investment products for IRAs and rollovers from ERISA plans would constitute prohibited self-dealing and Thrivent's existing commission structure could be considered a prohibited transaction as well. Prior to the implementation of the New Rule, transactions involving IRAs have never before been regulated by DOL, under ERISA or otherwise.

12. Because Thrivent employs captive agents who sell proprietary products on a commission basis, and because Thrivent receives differential compensation, Thrivent cannot continue to do business and offer the full suite of products currently offered to its Members without relief—through the BIC Exemption—from the New Rule.

13. In order to take advantage of the BIC Exemption, however, Thrivent would be forced to abandon the dispute resolution procedures that best support Member relations and maintain its fraternal character. Doing so would undermine uniformity

among its Members with respect to the rights and obligations set forth in Thrivent insurance products, and undermine Thrivent's governance structure.

14. There is no provision in ERISA that indicates Congress's intent to create a class action remedy that must be exclusively pursued in a judicial forum. To the extent Congress has spoken to the issue, it has unequivocally stated in the Federal Arbitration Act ("FAA") that private arbitration agreements must be honored as a preferred means of resolving disputes. As a result, in purporting to adopt the BIC Exemption, DOL has exceeded its authority under the APA.

15. For these reasons, and because the BIC Exemption is otherwise contrary to law, Thrivent seeks an order from this Court declaring unlawful, vacating, and enjoining implementation of the BIC Exemption's requirement that best interest contracts include a provision permitting judicial class actions to resolve claims.[2]

PARTIES

16. Plaintiff THRIVENT FINANCIAL FOR LUTHERANS, a fraternal benefit society, is a Wisconsin corporation with its principal place of business in Minneapolis, Minnesota.

17. Pursuant to specific delegations of authority from Congress, Defendant THE UNITED STATES DEPARTMENT OF LABOR is the federal agency with authority to issue "necessary or appropriate" regulation under ERISA. *See* 29 U.S.C. § 1135. DOL is headquartered in Washington, D.C. and is subject to the APA. *See* 5 U.S.C. § 551(1).

18. Defendant THOMAS E. PEREZ, is the U.S. Secretary of Labor and is sued in his official capacity. The Secretary is subject to the APA. *See* 5 U.S.C. § 551(1).

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[2] As noted *infra* at ¶ 74, the BIC Exemption explicitly provides that its prohibition against class action waivers is severable, if a court holds that prohibition invalid.

JURISDICTION AND VENUE

19. Because this action arises under the APA, 5 U.S.C. § 500, *et seq.*, ERISA, 29 U.S.C. § 1001, *et seq.*, the Code, 26 U.S.C. § 1, *et seq.*, and the FAA, 9 U.S.C. § 1, *et seq.*, this Court has federal question jurisdiction under 28 U.S.C. §1331.

20. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(C), because the Defendants are officers and agencies of the United States and Plaintiff's principal place of business is in this District and no real property is involved in this action.

21. This Court can grant declaratory and injunctive relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. §§ 701-706, for violations of, *inter alia*, the APA, 5 U.S.C. § 706, ERISA, 29 U.S.C. § 1001, *et seq.*, and the FAA, 9 U.S.C. § 1, *et seq.*

THRIVENT FINANCIAL FOR LUTHERANS

Thrivent's History as a Fraternal Benefit Society

22. Founded in 1902 as the predecessor organization Aid Association for Lutherans ("AAL"), Thrivent is a membership-owned and member-governed fraternal benefit society of Christians. Under Wisconsin law, a fraternal benefit society generally must: have a representative form of government; have a system of local lodges; and provide insurance and other benefits to its Members. *See* Wis. Stat. § 614.01(1)(a). Thrivent satisfies each of these requirements.

23. Thrivent is owned by its Membership and is governed by a board of directors, all of whom are also benefit Members of Thrivent. Today, Thrivent has nearly 2.5 million Members nationwide, and over 282,000 in the State of Minnesota. Thrivent's directors are elected directly by Thrivent's Membership in elections that are conducted through voting by mail or online. Proxy voting is not permitted when electing directors, and each Thrivent Member is entitled to one vote regardless of the value of his or her certificate or the number of certificates (i.e., the fraternal insurance contract) the Member holds.

24. Consistent with Thrivent's status as a fraternal benefit society, Thrivent's assets are entirely Membership-owned. Wisconsin law provides that a fraternal benefit society has no capital stock and exists solely for the benefit of its Members and their beneficiaries. *See* Wis. Stat. § 614.01. Thus, Thrivent's Board of Directors is charged with acting in the best interests of the Membership, which owns Thrivent's assets. As the beneficial owners of Thrivent, Thrivent's Members directly benefit from Thrivent's financial gains and directly suffer loss based on Thrivent's financial losses.

25. Consistent with Wisconsin law, upon becoming Thrivent Members and insureds, every Member agrees to a "maintenance of solvency" obligation making clear that they can be required to pay their "share of the deficiency" should Thrivent's assets become impaired. *See* Wis. Stat. § 614.19(3)(b) (requiring all fraternal benefit societies to include in their laws and insurance contracts a provision that "if the financial position of the fraternal becomes impaired, the board of directors or the supreme governing body may, on an equitable basis, apportion the deficiency among the members of the fraternal, the insured employees or the owners, or any combination thereof").

26. Thrivent's mission is to provide: (1) insurance and other fraternal benefits to Members as permitted under Wisconsin law; (2) fraternal and benevolent activities through local branches; (3) assistance to Christian congregations and their institutions; and (4) assistance to other community-related and charitable endeavors as determined appropriate by Thrivent's Board of Directors.

27. In addition to offering financial products to its Membership, Thrivent provides numerous types of educational, community, and religious benefits to its Members. Thrivent, through its Members, also engages in significant charitable works. In 2015 alone, for example, Thrivent donated nearly $204 million and over 9.3 million hours in Members' time to charitable causes.

28. As a not-for-profit fraternal benefit society, Thrivent is a type of life insurer. It is organized and operating pursuant to Chapter 614 of the Wisconsin statutes,

known as the Wisconsin Fraternal Code. The Wisconsin Fraternal Code is a part of the insurance laws of the State of Wisconsin. Section 614.05 of the Wisconsin Statutes specifies that fraternal benefit societies are subject to the requirements of the Fraternal Code, and they are exempt from other Wisconsin insurance laws, except to the extent those other insurance laws are specifically made applicable to fraternal benefit societies. Each of the other forty-nine states and the District of Columbia have adopted their own fraternal code, and each state's fraternal code includes a similar exemption from other insurance laws of that state. In addition to Chapter 614, specific sections in Chapter 632 of the Wisconsin Statutes ("Insurance Contracts In Specific Lines") address the statutory requirements of the fraternal insurance contract. *See* Wis. Stat. §§ 632.91-632.96.

29. The insurance contracts of fraternal benefit societies differ in several significant respects from the insurance contracts issued by other forms of life insurers. The insurance contracts of fraternal benefit societies are "open contracts" which must include "the laws of the fraternal", Wis. Stat. § 632.93(1), which are defined to mean "its articles of incorporation and bylaws, however designated." Wis. Stat. § 614.01(1)(b). The Fraternal Code provides that changes to the laws of a fraternal apply to previously-issued policies and "bind the owner and any beneficiary under the policy or certificate as if they had been in force at the time of the application, so long as they do not destroy or diminish benefits promised in the policy or certificate." Wis. Stat. § 632.93(2).

30. Every other state's fraternal code similarly includes an open contract provision specifying that the fraternal insurance contract includes the laws of the society, and that amendments to those laws are included in and binding upon all fraternal contracts, irrespective of when the contract was delivered. This principle reflects the fact that fraternal benefit societies are governed by their member-insureds (who are ultimately responsible for their constitution and bylaws), as well as the "indivisible unity" among members, as long recognized by the United States Supreme Court. *See Modern Woodmen of Am.*, 267 U.S. at 551. Open contracts further the abiding fraternal interest in uniformity

among the membership with respect to their fraternal rights and obligations, and they are therefore instrumental to a fraternal benefit society's internal governance.

31. A fraternal benefit society's principal regulator is the insurance regulator for the state of its domicile. Thrivent's principal regulator is the Wisconsin Office of the Commissioner of Insurance ("Commissioner"). The Commissioner is empowered to conduct examinations of Thrivent under Wisconsin Statute Section 601.43 (as Section 614.05 specifies that Chapter 601 applies to fraternal benefit societies to the same extent as mutual insurers). Thrivent's insurance marketing practices are subject to regulation under Chapter 628 of the Wisconsin statutes and Thrivent is subject to unfair and deceptive trade practices statutes to the same extent as other types of life insurers.

32. In addition to Thrivent's domiciliary state of Wisconsin, Thrivent is also authorized to conduct insurance business as a foreign fraternal benefit society in each of the other 49 states and the District of Columbia. In order to sell life insurance products in states outside of Wisconsin, Thrivent is required to obtain a certificate of authority from those states. Thrivent obtains each such certificate under that state's fraternal code, as a foreign fraternal benefit society. Similarly, foreign fraternal benefit societies are also subject to regulatory oversight by the insurance commissioners in the states in which they are authorized to transact business as a foreign fraternal benefit society.

Thrivent Products and Financial Representatives

33. Thrivent offers a broad range of insurance products and services, including proprietary life insurance and annuity products, to its Members. These proprietary insurance products are offered to Thrivent's Members through tailored guidance provided by Thrivent's licensed and captive financial representatives nationwide. Offering such insurance provides an important source of financial protection for Members and is not only permitted, but required by federal and state law. *See* Code § 501(c)(8) (exempting fraternal benefit societies that, *inter alia*, "provid[e] for the payment of life, sick, accident, and other benefit to the members"). Thrivent, like other fraternal benefit

societies, focuses on helping persons of modest means. The median size of a Thrivent IRA is $25,000. More than half of the Members Thrivent serves with IRAs have annual household incomes of less than $75,000.

34. Thrivent financial representatives generally are independent contractors, who are compensated differently depending on the products and services they sell. All of Thrivent's financial representatives licensed with Thrivent can offer and sell Thrivent annuities and insurance products and other proprietary products. All annuities sold to Thrivent Members go through a "suitability" review and therefore must meet the same review standards as securities products must under FINRA's suitability standards. Accordingly, before selling an annuity to a Member, Thrivent's financial representatives consider factors such as the Member's financial information, net worth, risk tolerance, investment objective, and liquidity.

35. In general, Thrivent's financial representatives are compensated on a transaction-based model for the sale of insurance products. Under the transaction-based model, Thrivent Members pay as they go with the financial representative receiving commissions in connection with the transactions they execute. Thrivent also directly receives compensation for the sale of insurance products that can vary depending on the product sold. This transaction-based model is often a better value for Thrivent Members who buy a product for which there may be no need for ongoing advice; it is also often the best option for Members who lack the account minimums generally required under the fee-based model to make the fee-based model cost effective for the Member.

36. The New Rule prohibits Thrivent and its financial representatives from receiving commissions and differential compensation in connection with the purchase, sale, and holding of certain products by plan participants and beneficiaries, IRA owners, or certain small plans—unless they qualified for exemptive relief under the new or amended prohibited transaction exemptions.

37. A core component of Thrivent Members' retirement planning is traditional life insurance products such as term life insurance and permanent life insurance (both whole life insurance and universal life insurance). These traditional life insurance products are regulated by state insurance commissioners and are not subject to DOL's New Rule. Thrivent's traditional insurance products have required the use of Thrivent's Member Dispute Resolution Program ("MDRP") for over fifteen years with great success and in the best interest of Thrivent's Membership.

38. Thrivent also sells certain proprietary annuity products—e.g., fixed indexed annuities and fixed rate annuities. As a general matter, fixed annuities are a form of insurance product that offer guarantees of (1) minimum accumulation value, (2) protection from market risk, and (3) income the policyholder cannot outlive. Unlike all other types of retirement investment vehicles, fixed annuities offer two insurance-backed, contractual guarantees: guaranteed protection of principal and a guaranteed annuitized income payment.

39. A fixed rate annuity guarantees a minimum interest rate set by the insurance company. The policy may provide a guaranteed interest rate for the lifetime of the annuity or may allow the insurance company to reset the interest rate periodically.

40. A fixed indexed annuity bases its interest rate on an external market index, such as the S&P 500, with a guarantee that the rate will never fall below zero. The policyholder does not directly participate in any security investment. Rather, the insurance carrier, such as Thrivent, assumes the investment risk, guaranteeing the fixed indexed annuity can never lose value based on performance of the equity markets. The advantage of a fixed indexed annuity over a fixed rate annuity is the opportunity to earn higher interest from potentially favorable changes in the applicable market index. Aside from the manner in which interest is determined and credited, fixed indexed annuities function in all other respects the same as fixed rate annuities, including the predictable stream of lifetime income that is contractually guaranteed by the insurance company.

41. Thrivent's fixed annuity products—like its traditional insurance products—have long been regulated by state insurance commissioners[3] and have required the use of Thrivent's MDRP for over fifteen years with great success and in the best interest of Thrivent's Membership. However, unlike traditional insurance products, Thrivent's fixed annuity products are subject to DOL's New Rule to the extent they involve a covered transaction. Prior to DOL's implementation of the New Rule, a Thrivent financial representative's discussions with a Member (or a potential Member) about whether annuity products might meet that individual's financial needs in connection with an IRA or 401(k) rollover were not regulated by DOL.

Thrivent's Member Dispute Resolution Program

42. Thrivent's MDRP is incorporated into all of Thrivent's fraternal insurance contracts through the open contract provision by which Thrivent's Articles of Incorporation and Bylaws are incorporated into all Thrivent insurance contracts, as required under state law. The MDRP Bylaw was adopted by Thrivent's Member-elected Board of Directors as a part of Thrivent's Articles of Incorporation and Bylaws in 1999 (at which time Thrivent was known as AAL). In so doing, Thrivent's Board of Directors determined that the MDRP is in the best interests of Thrivent's Membership.

43. The MDRP Bylaw, which is Section 11 of Thrivent's Bylaws, requires binding, mandatory arbitration for any Member disputes with Thrivent. Section 11 "applies to all past, current and future benefit certificates, members, insureds, certificate

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[3] Congress has determined that fixed annuities should be regulated by the states as insurance products, rather than under federal securities laws. Following an attempt by the SEC to regulate fixed annuities under the securities laws, Congress made its intentions clear in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"). Congress added a clarifying note to Section 77c of the 1933 Act declaring that fixed indexed annuities are exempt from regulation under the federal securities laws. *See* Public Law 111-203, Title IX, Subtitle I, § 989J (July 21, 2010). Consequently fixed annuities are treated exclusively as insurance products under federal law and are not subject to securities regulation.

owners, beneficiaries and the Society. It applies to all claims, actions, disputes and grievances of any kind or nature whatsoever. It includes, but is not limited to, claims based on breach of benefit contract[.]" Bylaws, § 11(b). "No lawsuits or any other actions may be brought for any claims or disputes covered by" Section 11. *Id.* § 11(c).

44. The MDRP is the sole means for presenting and resolving grievances, complaints, or disputes between Members, insureds, certificate owners or beneficiaries and Thrivent or Thrivent's directors, officers, agents and employees. The MDRP reflects Thrivent's Christian belief system and strives to preserve Members' fraternal relationship.

45. Thrivent's MDRP provides a three-step dispute resolution process. The first step is appeal, whereby the Member can appeal a dispute to a panel of reviewers who are management-level Thrivent employees who are not involved with the original decision at issue and who do not supervise the employee who made the decision at issue. The second step is mediation, whereby the Member may elect to have a dispute mediated by a mediator selected by the Member through a third party agency in any state of the country and in accordance with the American Arbitration Association's mediation rules (or in accordance with applicable rules of another agreed-upon neutral organization). The results of appeal and mediation are not binding, and upon their completion either party may then demand that the matter will be resolved by binding arbitration administered by and in accordance with the applicable arbitration rules as prescribed by the American Arbitration Association (or in accordance with applicable rules of another agreed-upon neutral organization). *Id.*

46. The MDRP is protective of Thrivent's Members and includes the following requirements: Thrivent must take reasonable measures to assure that the MDRP process proceeds promptly. Thrivent (not its Members) pays all administrative forum-related costs of mediation and/or arbitration, including the fees and expenses of mediators and arbitrators, filing fees and reasonable and necessary court reporting fees. Thrivent

accommodates its Members' preferences with respect to the location of mediation and arbitration. These measures confirm that an arbitral forum will be both financially and geographically accessible to Members and will enable them to resolve any disputes with Thrivent in arbitration. With regard to damages and other relief recoverable in arbitration, Section 11 provides that, except as limited therein, "the parties to a dispute may be awarded any and all damages or other relief allowed for the claim in dispute by applicable federal or state law, including attorney's fees and expenses if such attorney's fees and expenses are deemed appropriate under applicable law." The decision of the arbitrator chosen by the individual and Thrivent is final and binding on both parties.

47. A key benefit of the MDRP is that it preserves the fraternal relationship between Thrivent and its Members by avoiding adversarial litigation that could threaten to undermine the organization's core mission. Thrivent's Bylaws provide that no lawsuits or other actions are permitted for claims or disputes covered by the MDRP. Thrivent's MDRP provides for resolution of disputes on an individual basis, involving Thrivent and the Members. Representative or class actions are not permitted under the MDRP Bylaw, which provides that "no disputes may be brought forward in a representative group or on behalf of or against any 'class' of persons, and the disputes of multiple members, insureds, certificate owners or beneficiaries (other than immediate family) may not be joined together for purposes of these procedures." *See* Bylaws, § 11(e).

48. The MDRP is consistent with Thrivent's fraternal nature, consistent with the Christian belief system of its Members, and reflects the careful balancing between Thrivent's and its Members' desire for a prompt, fair and efficient resolution of disputes, on the one hand, and the protection of the interests of all Members on the other. As such, the MDRP is an integral part of Thrivent's governance structure. Experience has shown that the MDRP not only provides a fair and efficient process for dispute resolution, but is also in the best interest of Members. For example, the average cycle time for an appeal is 15 days, for a mediation is 88 days, and for an arbitration is 287 days. Of 5,604

complaints raised by Thrivent Members from 2011 to 2015, 5,430 (96.9%) were resolved through a Member Relations process and thus were not addressed in the MDRP. During that period, there were 174 appeals, 70 mediations, and 16 arbitrations. The MDRP enhances Thrivent's ability to resolve Member disputes quickly and amicably. This is consistent with the concept of a membership-owned and member-run organization that operates for the exclusive benefit of its Members, and the MDRP furthers Thrivent's fraternal character.

49. Thrivent's insurance contracts, all of which incorporate the MDRP Bylaw, have been approved for marketing and sale in all fifty states and the District of Columbia. Thrivent's sales practices and claim settlement practices have always been subject to the regulatory oversight of the Wisconsin Commissioner and the regulatory oversight of every other state's department of insurance. This regulatory oversight includes Thrivent's marketing, sale, and settlement practices regarding fixed indexed annuities, which have always been regulated as insurance products by state insurance regulators.

STATUTORY AND REGULATORY FRAMEWORK

ERISA

50. In 1974, Congress enacted ERISA, which sets minimum standards for most voluntarily established employer-provided pension and health plans to provide protection for individuals enrolled in these plans. As a general matter, ERISA prohibits investment advisors who are classified as "fiduciaries" from engaging in advice that would represent a conflict of interest.

51. ERISA applies to "any employee benefit plan" that is "established or maintained" (1) "by an employer," (2) "by an employee organization," or (3) "by both." 29 U.S.C. § 1003(a). The definitions of "employee benefit plan" and "plan" also are limited to plans "established or maintained … by any employer … or by any employee organization." *Id.* § 1002(1)-(3). IRAs generally do not fall within any of these definitions. *See* 29 C.F.R. § 2510.3(d). IRAs were first created by the passage of ERISA,

which enacted 26 U.S.C. § 408. *See* Pub. L. 93-406, Title II, § 2002(b). Nevertheless, Congress chose not to characterize IRAs as "plans" under ERISA, except in very limited circumstances not relevant to this lawsuit.

52. Fiduciary status under ERISA is determined in reference to an individual's activities that relate to an ERISA plan, as specified by the statute. Under ERISA, "[a] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A).

53. ERISA requires a fiduciary of a plan to discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries; for the exclusive purpose of providing benefits to participants and their beneficiaries as well as defraying reasonable expenses of administering the plan; and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. *See* 29 U.S.C. § 1104(a)(1).

54. Plan fiduciaries who violate these duties are "personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." *Id.* § 1109. ERISA also contains limited civil enforcement provisions allowing DOL to challenge breaches of fiduciary duty. *Id.* § 1132.

55. ERISA prohibits a plan fiduciary from causing the plan to engage in certain so-called "prohibited transactions" between the plan and a "party in interest." *See* 29 U.S.C. § 1106. ERISA also provides that a fiduciary with respect to a plan must not "(1) deal with the assets of the plan in his own interest or for his own account, (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." *See* 29 U.S.C. § 1106(b).

56. However, under ERISA certain transactions are statutorily exempt from prohibited transaction treatment. *See* 29 U.S.C. § 1108(b). In addition, an administrative exemption may be granted, on either an individual or class basis, subject to a finding that the exemption is "administratively feasible, … in the interests of the plan and of its participants and beneficiaries" of the plan, and "protective of the rights of participants and beneficiaries" of the plan. *See* 29 U.S.C. § 1108(a).

57. At the same time that it enacted ERISA, Congress included in the Code a parallel "fiduciary" definition applicable to non-ERISA tax-favored plans like IRAs. *See* 26 U.S.C. § 4975(e)(3)(B). Congress did not, however, impose the same standards of conduct on fiduciaries under the Code that apply to ERISA fiduciaries, nor did it establish the private rights of action that are available against fiduciaries under ERISA. Instead, the limitations in the Code are enforced solely through excise taxes administered by the Department of the Treasury. *See* 26 U.S.C. § 4975(a), (f)(8)(E).

58. DOL was given the authority through presidential Executive Order to interpret the definition of "fiduciary" and to issue prohibited transaction exemptions under Section 4975 of the Code, *see* Reorganization Plan No. 4 of 1978, § 102, 43 Fed. Reg. 47,713 (Aug. 10, 1978), *reprinted in* 5 U.S.C. app. 1 (2016), *and in* 92 Stat. 3790

(1978) ("Reorganization Plan No. 4"), but DOL lacks any enforcement authority with respect to IRAs.

DOL's 1975 Rule Implementing the "Investment Advice" Prong of ERISA's Fiduciary Definition

59. As noted above, included in ERISA's definition of fiduciary is someone who provides "investment advice for a fee," with respect to "any moneys or other property" of an ERISA plan. *See* 29 U.S.C. § 1002(21)(A)(ii). Regulations issued in 1975 by DOL set forth a five-part test for determining whether someone is a fiduciary under this provision of ERISA, consistent with the principles of trust law and from the Investment Advisors Act that are incorporated in ERISA's text.

60. Under the 1975 rule, an adviser is an "investment-advice fiduciary" if he or she: (1) "renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property," (2) on a "regular basis," (3) "pursuant to a mutual agreement, arrangement or understanding [with the] plan or a [plan] fiduciary," (4) that such advice will be "a primary basis for investment decisions," and (5) that the advice will be individualized to the plan. *See* 29 C.F.R. § 2510.3-21(j)(1).

61. Under the 1975 rule, broker-dealers, registered representatives, insurance agents, and other financial professionals could thus engage in many different types of interactions with people seeking to save for retirement without being considered "fiduciaries" under ERISA or the Code. The hallmarks of investment advice memorialized in the 1975 regulation have continued to govern the determination of an ERISA or Code fiduciary relationship for over forty years. In 2005, for example, DOL issued guidance stating that a recommendation regarding a "rollover" of plan assets to an IRA was not fiduciary advice, and confirming that to be fiduciary advice,

recommendations must be provided on a "regular basis," among other things. *See* Advisory Opinion 2005-23A, ERISA Sec. 3(21) (Dep't of Labor Dec. 7, 2005).

DOL's New Rule

62. In response to developments since 1975, e.g., the growth of participant directed defined contribution plans and individual retirement accounts, DOL concluded that the 1975 regulations were outdated and did not adequately address conflict of interest considerations. *See* 81 Fed. Reg. 20,946. After many years, including two sets of proposed regulations, on April 8, 2016, DOL issued its New Rule revamping the standards for determining when a party is a fiduciary with respect to an ERISA retirement plan or an IRA by virtue of providing investment advice for a fee.

63. Under the New Rule a broader range of brokers, insurance agents, advisers and financial service providers are treated as fiduciaries and therefore subject to ERISA's fiduciary responsibility requirements. In connection with this change, DOL also issued new and revised prohibited transaction class exemptions that permit providers of fiduciary investment advice to continue to receive certain forms of compensation and engage in certain transactions without violating applicable prohibited transaction rules.

64. The "applicability date" of the New Rule is April 10, 2017, at which time its requirements become operational.

Definition of "Fiduciary"

65. Under the New Rule, a person shall be deemed to be rendering investment advice under 29 U.S.C. § 1002(3)(21)(A)(ii) if: Such person provides a "recommendation" for a fee or other compensation as to (i) buying, holding, selling or exchanging securities or other investment property in a plan or IRA and how investments "should be invested after [they] are rolled over, transferred, or distributed from the plan or IRA;" and (ii) "management of securities or other investment property, including … recommendations with respect to rollovers" from the plan and selection of investment advisors. *See* 81 Fed. Reg. 20,997. Additionally, to render investment advice, the person

making the recommendation must also: Acknowledge fiduciary status under ERISA or the Internal Revenue Code; render the advice under "an agreement, arrangement or understanding" that the advice is based on the "recipient's particular needs;" or provide individualized or specifically directed advice regarding a specific investment management decision (including rollovers from a plan or IRA). *See id*.

66. Further, under the New Rule, a "recommendation" is defined as a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion for a particular course of action. *See* Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. at 20,971 (to be codified at 29 C.F.R. § 2510.3-21(b)).

67. DOL's New Rule substantially expands the types of retirement advice covered by fiduciary protections. Persons who become fiduciaries under this broadly sweeping definition cannot receive brokerage or insurance commissions, or any other type of transaction-based payments. Such payments are now considered "prohibited transactions" forbidden to fiduciaries under ERISA and the Code absent exemptive relief.

<u>The BIC Exemption</u>

68. DOL's New Rule creates new prohibited transaction exemptions, as well as amends several existing class exemptions. Prohibited transaction exemptions permit conduct that otherwise would violate the New Rule so long as the parameters of the prohibited transaction exemption are followed. The new prohibited transaction exemption relevant to Thrivent's Complaint is the BIC Exemption.

69. To avoid engaging in prohibited transactions with respect to fixed indexed annuities, the only exemption upon which Thrivent could potentially attempt to rely is the BIC Exemption.[4] Thrivent could also seek to rely upon the BIC Exemption to avoid

[4] With respect to fixed rate annuities, Thrivent can also attempt to rely upon another prohibited transaction exemption—Prohibited Transaction Exemption 84-24, which does not require a private contract and new contractual causes of action. *See*

engaging in prohibited transactions with respect to other products. The BIC Exemption broadly provides relief from prohibited transaction rules for the receipt of compensation by investment advice fiduciaries and their affiliated financial institutions for services provided in connection with the purchase, sale, or holding of investments by participants and beneficiaries, IRA owners, and "retail" fiduciaries of plans or IRAs (generally persons who hold or manage less than $50 million in assets, and are not banks, insurance carriers, registered investment advisers or broker dealers), including small plan sponsors (Retirement Investors).

70. The BIC Exemption is designed to address the issue that under the New Rule, the receipt by a fiduciary adviser (or his or her financial institution) of certain types of compensation from a plan (such as a commission) or from third parties (such as 12b-1 fees, revenue sharing, sales loads, etc.) would typically violate the ERISA prohibited transaction restrictions against self-dealing because the amount or when such compensation is received by the fiduciary adviser would be affected by the advice the fiduciary adviser provides.

71. In order to qualify for the BIC Exemption, financial institutions must agree that they and their investment advice fiduciaries will adhere to the BIC Exemption's requirements in an enforceable, written contract. *See* 81 Fed. Reg. at 21,076. This contract forms a basis upon which consumers could enforce new rights through a private cause of action for breach of contract.

72. The BIC Exemption also requires that various items of information must be incorporated into the contract including: (1) an acknowledgement by the adviser and financial institution of fiduciary status under ERISA or the Internal Revenue Code with

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Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters, 81 Fed. Reg. 21,147 (Apr. 8, 2016).

respect to any investment recommendations; (2) the adviser's and financial institution's agreement to provide investment advice that is in the Retirement Investor's "best interest"; (3) a warranty that the adviser or financial institution will only receive "reasonable compensation within the meaning of ERISA Section 408(b)(2) and Code Section 4975(d)(2)"; and (4) an obligation on the part of the financial institution to "adopt[]" and "comply" with "written policies and procedures" designed to ensure that insurance agents and broker-dealers adhere to the Impartial Conduct Standards. 81 Fed. Reg. at 21,077.

73. The BIC Exemption also contains a requirement that an advisor or financial institution cannot require consumers to fully waive their rights to pursue action in court. *See* 81 Fed. Reg. at 21,078. Instead, while best interest contracts may require that individual disputes go to mandatory arbitration, consumers must retain the right to pursue a class action lawsuit in court. *See id.*

74. DOL, in apparent recognition of the possibility that a court might find the prohibition of class actions invalid under the FAA, included in the BIC Exemption the following severability clause:

> In the event that the provision on pre-dispute arbitration agreements for class or representative claims in paragraph f(2) of this Section is ruled invalid by a court of competent jurisdiction, this provision shall not be a condition of this exemption with respect to contracts subject to the court's jurisdiction unless and until the court's decision is reversed, but all other terms of the exemption shall remain in effect.

81 Fed. Reg. at 21,078-21,079.

<u>The New Rule's Impact on Thrivent</u>

75. Thrivent offers a broad range of financial products and services—including life insurance and annuities—to Thrivent Members, primarily individuals and families of modest means. Thrivent recommends these products to its Members in various circumstances, including in connection with ERISA-plan-to-IRA rollovers, IRA-to-IRA rollovers, and distributions from existing IRAs for which Thrivent or its affiliates serve as

an investment adviser. Consequently, Thrivent expects that its financial representatives will be deemed "fiduciaries" by reason of providing investment advice, under the New Rule, in connection with some or all of these activities.

76. Because Thrivent representatives receive commissions and other transaction-based compensation, and Thrivent receives differential compensation, in connection with the sale of these proprietary products, Thrivent will need to rely on an exemption to avoid engaging in a non-exempt prohibited transaction under ERISA or the Code. With respect to Thrivent's sale of fixed indexed annuities, the BIC Exemption is the only prohibited transaction exemption available to Thrivent. As a result, Thrivent has no other alternative to availing itself of the BIC Exemption if it desires to continue providing its Members the opportunity to purchase fixed index annuities in connection with certain transactions such as IRA rollovers.

77. In the BIC Exemption, DOL provided that exemptive relief will not be available if a financial firm or representative has an arbitration agreement with a customer that includes a class action waiver. *See* 81 Fed. Reg. at 21,021. Because the broad sweep of the New Rule's definition of fiduciary would prohibit many common forms of compensation, and because the fee-based compensation model that is permissible under the New Rule is incompatible with certain investment products, the New Rule forces financial and insurance firms and professionals into relying on the BIC Exemption—effectively prohibiting the enforcement of arbitration agreements containing class action waivers.

78. The only way that Thrivent could comply with DOL's New Rule would be to eliminate or change the MDRP Bylaw requirement from those insurance contracts that are covered by the New Rule, and to permit class action litigation with respect to such products. Such a change would eliminate Thrivent's chosen method of dispute resolution for a component of Thrivent's suite of insurance products that it offers to its Members, which method Thrivent, through its member-elected Board of Directors, believes to be in

the best interests of its Membership and consistent with its fraternal character. In addition to the impact that such change would have on Thrivent's governance with respect to those products in particular, such a change to some of Thrivent's insurance contracts would also undermine the vital fraternal interest in uniformity among Members and the "indivisible unity" of the Membership of Thrivent as a fraternal benefit society. Thrivent's MDRP requirement would be excluded from some Thrivent insurance contracts, while the MDRP requirement would continue to be included in other Thrivent insurance contracts.

79. The requirement that Member disputes be resolved through class litigation would substantially limit Thrivent's ability to accomplish its mission and best preserve its fraternal character and relations with its Members. The time and expense of class action litigation would convert the fairness, promptness and efficiency that are the hallmarks of the MDRP into an expensive, lengthy and adversarial process.

80. Thrivent's requirement that disputes must be resolved on an individual basis through the MDRP, and may not be resolved through judicial class action litigation, is entirely consistent with and enforceable under the FAA. The Supreme Court has clearly held that agreements that require resolution of disputes on an individual basis in arbitration and that prohibit class actions are enforceable under the FAA, and that any laws or regulations prohibiting such agreements are unenforceable. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). And to that end, federal and state courts around the country have uniformly enforced Thrivent's MDRP Bylaw and required resolution of disputes on an individual basis, including in connection with putative class actions. *See, e.g.*, *Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 809 (7th Cir. 2003); *aff'g* No. 00-C-1327, 2001 WL 34388865 (E.D. Wis. Oct. 31, 2001), *and aff'g Aid Ass'n for Lutherans v. Radmer*, No. 99-C-1205, 2001 WL 34388864 (E.D. Wis. Oct. 31, 2001), *cert. denied*, 540 U.S. 1149 (2004).

81. Because the BIC Exemption would prohibit certain of Thrivent's insurance contracts from including the MDRP Bylaw and requiring resolution on an individual basis in arbitration, and not through a judicial class action, the BIC Exemption is contrary to and unenforceable under the FAA.

82. Thrivent recognizes it is not the only entity to commence a legal challenge related to the New Rule and the BIC Exemption. In fact, several lawsuits have been filed in other federal district courts. *See Chamber of Commerce of the U.S.A. v. Perez*, No. 16-cv-1476 (N.D. Tex. June 2, 2016), *Am. Council of Life Insurers v. Dep't of Labor*, No. 16-cv-01530 (N.D. Tex. June 8, 2016), *Indexed Annuity Leadership Council v. Perez*, No. 16-cv-10537 (N.D. Tex. June 8, 2016), *Nat'l Ass'n for Fixed Annuities v. Perez*, No. 16-cv-01035 (D.D.C. June 2, 2016), *Market Synergy v. Dep't of Labor*, No. 16-cv-04083 (D. Kan. June 8, 2016). However, Thrivent's challenge is unique in that it challenges only the limitation on arbitration included in the BIC Exemption, and not DOL's New Rule in its entirety.

83. Thrivent's challenge here is limited to the BIC Exemption's preclusion of class action waivers, as a result of the exemption's profound challenges to Thrivent's relationship with its Members, its dispute resolution process, and its governance. To that end, and in an effort to avoid contentious litigation with DOL, in late July 2016 Thrivent approached DOL in order to obtain an individual prohibited transaction exemption ("IPTE") under Section 408(a) of ERISA.

84. The requested IPTE would have mirrored the BIC Exemption, in all respects except that the contract or other agreement entered into by Thrivent and its Members would include language regarding restrictions on participation in class and other representative actions and all disputes that arise in connection with the sale of Thrivent's insurance and annuity products would be addressed in accordance with Thrivent's MDRP. Only when it became clear that Thrivent's efforts to obtain an IPTE

would not be successful did Thrivent decide to file this lawsuit, in order to protect its chosen method of dispute resolution and its governance structure.

CLAIMS FOR RELIEF

COUNT I

VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT AND THE FEDERAL ARBITRATION ACT AGENCY ACTION IN EXCESS OF STATUTORY AUTHORITY

85. Paragraphs 1 through 84 are incorporated by reference as though specifically alleged here.

86. The APA forbids agency action "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C).

87. The BIC Exemption prohibits best interest contracts that "waive[] or qualif[y] [an investor's] right to bring or participate in a class action or other representative action in a court in a dispute with the Advisor or Financial Institution." 81 Fed. Reg. at 21,078.

88. Under the FAA, valid arbitration agreements must be enforced according to their terms unless the FAA "has been overridden by a contrary congressional command." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (internal citation and quotation marks omitted). This includes arbitration provisions containing class waivers. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

89. Nothing in ERISA gives DOL authority to preclude financial institutions and their clients from entering into and enforcing arbitration agreements that include class action waivers. *See Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996) ("Congress did not intend to exempt statutory ERISA claims from the dictates of the [FAA].").

90. DOL exceeded its statutory authority by purporting, in the BIC Exemption, to bar all waivers of participation in class actions or other representative actions without regard to whether those waivers are in connection with arbitration agreements.

91. Accordingly, Defendants' promulgation of the BIC Exemption violates the APA § 706.

92. Plaintiff has no adequate administrative remedy for DOL's unlawful action as described herein.

WHEREFORE, Thrivent respectfully prays that this Court:

a. Enter a declaratory judgment that the BIC Exemption's requirement that best interest contracts include a provision permitting judicial class actions to resolve claims violates the APA and the FAA;

b. Enter a preliminary and permanent injunction prohibiting the application or enforcement of the BIC Exemption's requirement that best interest contracts include a provision permitting judicial class actions to resolve claims;

c. Award Thrivent its costs of suit incurred herein, including reasonable attorneys' fees insofar as the same may be allowed by law or by statute; and

d. Award such other and further relief as the Court may deem just and proper.

Respectfully submitted,

Dated: September 29, 2016

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